JURY NULLIFICATION IN CONSCIENCE CASES

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The use of domestic courts to challenge the employment of military force abroad quite naturally encompasses the resort to civil disobedience as a means of initiating legal opposition to American foreign policy. Challenges to United States involvement in Viet Nam, for example, have been generated by such acts as destroying draft cards[1] and draft board files,[2] physically barring access of recruiters from the armed services or munitions manufacturers, to college campuses,[3] and stopping troop and supply trains directed toward the war zone.[4] In recent days, defendants charged with the substantive crimes inherent in such acts of disobedience have begun to assert the historical doctrine of jury nullification in an unfamiliar setting.

Their argument is deceptively simple—because the jury is ideally a representative cross section of the community,[5] it ought to be able to acquit a defendant who admits the commission of certain formally illegal acts, the commission of which the community, represented by the jury, approves. The major difficulty with this approach is that jurors, almost without exception, have no idea of the extent of their power in this respect, and, under recent case law, they cannot be enlightened as to this power.

An attempt to enlighten the jury was made in *United States* v. *Berrigan*,[6] in which nine Catholic priests and laymen were charged with the burning of certain draft board records in Catonsville, Maryland. During the defense summation, counsel, after discussing the Mo-

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1. United States v. O'Brien, 391 U.S. 367 (1968).
2. United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1968), 417 F.2d 1002 (4th Cir. 1969), *certiorari denied*, 90 Ct. 907 (1970).
3. Zwicker v. Boll, 270 F. Supp. 131 (D. Wis.), *aff'd per curiam*, 391 U.S. 353 (1968).
4. *See Hearings on H.R. 12047, H.R. 14925, H.R. 16175, H.R. 17140 and H.R. 17194, Bills to make Punishable Assistance to Enemies of the United States in Time of Undeclared War, Before the House Comm. on Un-American Activities*, 89th Cong., 2d Sess., pt. 1 (1966).
5. *See, e.g.*, Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).
6. 283 F. Supp. 336 (D. Md. 1968), 417 F.2d 1002 (4th Cir. 1969), *certiorari denied*, 90 S. Ct. 907 (1970). The doctrine of jury nullification was rejected by the Fourth Circuit. Although commented upon favorably by the First Circuit in United States v. Spock, 416 F.2d 165 (1st Cir. 1969), that court subsequently rejected it in United States v. Boardman, 419 F.2d 110 (1st Cir. 1970), stating in essence that such a drastic change in the law could only be engineered by the Supreme Court. Petition for certiorari will shortly be filed with the Supreme Court in that case. The jury nullification doctrine is also included in the requested charge in United States v. Dellinger, Criminal No. 69-180 (D. Ill., filed 1969), recently tried in Chicago.

retired to consider its verdict, the defendants were given permission to address the court. One of the defendants, George Mische, asked if the jury had been instructed that they could not act according to their consciences. The court answered in the following terms:

> The jury were told that they should decide the case on the law as given by the Court and on the evidence. And I did not emphasize it. I certainly did not tell them what your counsel wanted me to tell them; that they could disregard their oaths and let you off on sympathy or because they thought that you were sincere people. I am not allowed to do that.[10]

Historic cases apparently conflict with the court's approach in *Berrigan*. More than two centuries ago, Andrew Hamilton addressed a colonial jury in New York in defense of the printer, John Peter Zenger. Zenger was, under the law as it then existed and the facts of his case, clearly guilty of the crime of seditious libel with which he was charged, yet his lawyer was permitted to urge the twelve men sitting in judgment upon him "to see with their own eyes, to hear with their own ears, and to make use of their consciences and understanding in judging of the lives, liberties, or estates of their fellow subjects." [11]

Because Andrew Hamilton was permitted by this colonial judge to appeal to the conscience of the jury, his client was acquitted and the great principle of freedom of the press became one of our most cherished traditions. Yet today, in a theoretically more enlightened age, American juries cannot be told that under the law they have the power to decide any criminal case as they see fit, and that no one can question their decisions, no matter how contrary to law and fact they might be.[12] This produces an interesting anomaly: juries possess the power, but they cannot be told of it as they are of every other aspect of the juridical process.

The law, ancient and modern, was explicit on the inalienable power of jurors to follow their consciences, if that was the decisional route they desired to take. As early as 1665, Lord Hale, discussing the ultimate responsibility of the jury in deciding matters of fact, stated:

> decide factual issues on the basis of the evidence, and cannot decide factual issues just as they see fit.
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> I think I told the jury that it was their sole province—I gave that much of it to the jury—and that I was not attempting to control or influence their decision of the factual issues.
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> If I did not do that, I will be happy to correct it. I thought I did that right at the beginning.

10. *See* note 7 *supra*.
11. J. ALEXANDER, *supra* note 8, at 93.
12. . . . "[W]here matter of law is complicated with matter of fact, the jury have the right to determine both." *Id.* at 91.

> And although the witness might perchance swear the fact to the satisfaction of the court, yet the jury are judges, as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat of their own knowledge, that what was sworn was untrue, and possibly they might know the witnesses to be such as they could not believe, and it is the conscience of the jury, that must pronounce the prisoner *guilty* or *not guilty*.[13]

Centuries earlier, Littleton had affirmed

> that if a jury will take upon themselves the knowledge of the law upon the matter, they may.[14]

Lord Coke, commenting on the interpretation of Littleton, stated:

> And therefore it is false to say, that the jury hath not power, or doth not use frequently to apply the fact to the law, and thence taking their measures, judge of and determine the crime or issue by their verdict.[15]

In 1783, in the prosecution of William Davies Shipley, the Dean of St. Asaph, for seditious libel, Thomas Erskine, his lawyer, sought to put the question of justification to the jury, and to urge them of their right to nullify a judge's rulings if they believed that in justice the defendant was entitled to an acquittal. But Mr. Justice Buller, the presiding magistrate, adamantly refused to adopt this view and instructed the jury that they had nothing to do with the case except to find whether the defendant in fact published the pamphlet, and that it was for the court to decide upon the criminality of his conduct:

> [T]he question for you to decide is, Whether he is or is not guilty of publishing this pamphlet? . . . [T]here is no contradiction as to the publication; and if you are satisfied with this in point of fact, you are bound to find the defendant guilty.[16]

Though the judge was firm in his ruling, he nonetheless permitted Erskine to argue to the jury that

> [T]hey therefore call upon you to pronounce that guilt, which they forbid you to examine . . . . Thus without

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13. 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 312 (W. Stokes & E. Ingersoll ed. 1847).
14. T. LITTLETON, OF TENURES § 368 (E. Wambaugh ed. 1903).
15. 2 C. COKE, INSTITUTES OF THE LAW OF ENGLAND OR, A COMMENTARY UPON LITTLETON § 368 (F. Hargrave & C. Butler ed. 1853).
16. Proceedings against the Dean of St. Asaph for a seditious libel, 23 George III 608 [1783], 21 How. St. Tr. 847, 942-49 (1816).

> inquiry into the only circumstance which can constitute guilt, and without meaning to find the defendant guilty, you may be seduced into a judgment which your consciences may revolt at, and your speech to the world deny . . . . I shall not agree that you are therefore bound to find the defendant guilty unless you think so likewise.[17]

It was not only counsel for defendants who advocated the right of jury nullification, but also the founding fathers of our nation. For example, in 1771 John Adams said of the juror that "it is not only his right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." [18]

One scholar, writing in the *Yale Law Journal*, quoted from Quincy's Reports:

> It is worthy of notice how the history of this question (the powers and rights of juries) after the English Revolution of 1968 repeated itself in America nearly a century later. The great constitutional lawyers and judges of either Revolutionary period—Somers and Holt, Adams, Jay, Wilson, Seedell, Chase, Marshall, Hamilton, Parsons, and Kent—with one voice maintained the right of the jury upon the general issue to judge of the law as well as the fact. But they had hardly passed away, or fifty years elapsed since either Revolution, when the courts of the new government began to assert as much control over the consciences of the jury, as had been claimed by the most arbitrary judges of the Monarch whom that Revolution had overthrown.[19]

In 1794, Chief Justice John Jay had stated that jurors

> have . . . a right to take upon [themselves] to judge of both [questions of law and of fact], and to determine the law as well as the fact in controversy.[20]

Until 1835, the federal courts in America time and again specifically instructed juries that they were the judges both of the law and the fact in a criminal case, and were not bound by the opinion of the court.[21]

In 1879, Chief Judge Sharswood of the Supreme Court of Pennsylvania reminded his contemporaries of at least one of the cogent

17. *Id.* at 921.
18. Quoted in Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 THE YALE REV. 484 (1968).
19. Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L. J. 194 (1932).
20. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794).
21. *E.g.*, Case of Fries, 9 F. Cas. 826 (No. 5,126) (C.C.D. Pa.), United States v. Fries, 3 U.S. (3 Dall.) 515 (1799).

tivation of defendants, sought to educate the jury as to its role in these words:

> "Now, you are, as I have indicated, the cross-section, theoretically, of the community. Our Federal law says that juries should be representative cross-sections of the community. So, in speaking to you, we are speaking to the community, and we are hoping to reach you, a microcosm, a small segment, 12 people, four alternates, who are the community sitting in judgment.[7]

Then, quoting the words by Andrew Hamilton in the case of John Peter Zenger in New York in 1734, counsel for the defense added:

> Jurors are to see with their own eyes, to hear with their own ears, and to make use of their consciences and understanding in judging of the lives, liberties or estates of their fellow subjects.[8]

The court understood this as a plea to the jury to decide the case on the basis of conscience. It thus interrupted the summation to correct any such conception in the minds of the jurors.[9] After the jury had

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7. The author was defense counsel in *Berrigan*. The extensive quotations from the summation are from the author's copy of the transcript.
8. *See* note 7 *supra*. For an account of the Zenger case, *see* J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (S. Katz ed. 1963).
9. *See* note 7 *supra*. The court went on to remind counsel for the defense of what it had told him beforehand:

> If counsel argues that the jury has the power to decide the case on the basis of conscience, or similar grounds, rather than the facts as the jury may find the facts, and on the basis of the law as the Court instructs the jury, the Court will interrupt the argument to tell the jury their duty, and, of course, will also remind them in the charge of their duty to follow the instructions of the Court as to the law, as we do, and should do, in each and every case, if our system is to survive. If necessary, the court will refer to counsel's arguments in its charge.

Defense counsel pointed out that he had only asked the jurors to make use of their consciences, and that accordingly he fell within the limits of the court's instructions.

Subsequently, in denying certain requests to charge, the court restated its position as follows:

> A jury need not explain nor answer to anyone, including the Court for any verdict rendered by it and may decide factual issues as they see fit. I have never granted such a charge. Such a charge, so far as I know, has never been granted in this district or in this circuit.
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> The statement that the jury need not explain or answer to anyone, including the Court, for the verdict rendered by it, was made by Mr. Kunstler. He stated it in his argument. It was not contradicted by the Court, nor contradicted by the government.
>
> The second half of the requested instruction, if I read it right, is clearly wrong; that a jury may decide factual issues as they see fit. They must

reasons underlying the jury's right "to judge of the law as well as the fact." As he put it in *Kane v. Commonwealth:*

> The power of the jury to judge of the law in a criminal case is one of the most valuable securities guaranteed by the Bill of Rights. Judges may still be partial and oppressive, as well from political as personal prejudice, and when a jury are satisfied of such prejudice, it is not only their right but their duty to interpose the shield of their protection to the accused.[22]

In the leading case of *Sparf and Hansen v. United States,*[23] the United States Supreme Court asserted that it is the duty of jurors to accept and follow the judge's instructions as to the law. But *Sparf* must be read in the context of a long historical controversy over the rights of juries. In England, the extensive debates in Parliament that preceded the passage of Fox's Libel Law in 1792 made it quite clear that the real issue was "the right of the jury to take both the law and the fact in their own hands" so that "juries might go according to their consciences in the law." In *Sparf,* the Supreme Court fully recognized the rationale behind this fundamental controversy:

> [T]he language of some judges and statesmen in the early history of the country, implying that the jury were entitled to disregard the law as expounded by the court, is, perhaps, to be explained by the fact that "in many of the States the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury in law as well as in fact of much popular importance." [24]

Sparf involved the conviction of two crewmen of the murder on the high seas of the second mate of their vessel. Mr. Justice Harlan pointed out in his majority opinion that the trial judge had informed the jury that

> in a proper case, a verdict for manslaughter may be rendered . . . and even in this case you have the physical power to do so; *but, as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court.*[25]

In affirming the duty of the jury to apply the law as received from the

22. 89 Pa. 522, 527 (1879).
23. 156 U.S. 51 (1895).
24. *Id.* at 89, quoting F. WHARTON, CRIMINAL PLEADING AND PRACTICE § 806 (8th ed. 1880).
25. *Id.* at 62, n, 1 (emphasis in original).

court, Mr. Justice Harlan acknowledged a considerable body of law, including Chief Justice Jay's observations in *Brailsford*.[26]

In a long and persuasive dissent, Mr. Justice Gray, joined by Mr. Justice Shiras, clearly expounded the traditional view of the common law of both England and the United States that

> [T]he jury, upon the general issue of guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or fact, involved in that issue.[27]

It would serve no useful purpose to reiterate here the scores of cases, treatises, statutes, and other authorities culled from both sides of the Atlantic which are collected in Mr. Justice Gray's exhaustive analysis of the right and power of juries.[28] Suffice it to say, he forcefully reminded us that

> [A]s said by Alexander Hamilton in Croswell's Case, above cited, the power of deciding both law and fact upon the general issue in a criminal case is intrusted to the jury, "for reasons of a political and peculiar nature, for the security of life and liberty." 7 Hamilton's Works, 335; 3 Johns. Cas. 362. The people, by a jury drawn from among themselves, take part in every conviction of a person accused of crime by the government; and the general knowledge that no man can be otherwise convicted increases public confidence in the justice of convictions, and is a strong bulwork of the administration of the criminal law.[29]

In 1926, Judge Learned Hand observed in *Seiden v. United States* [30] that jurors

> [i]f they will, . . . may set at defiance law and reason and refuse to find the accused guilty; when they do, he escapes, however plain his guilt.[31]

Of course, Judge Hand went on to add that

> . . .though that is within their power, it is not within their right; they are as much bound by the law as the court. No judge is bound to recognize, or even to mention, that power in his dealings with them; on the contrary, he may and ordinarily should direct them to convict, if they find the

26. *See* note 20 *supra* and accompanying text.
27. Sparf and Hansen v. United States, 156 U.S. 51, 114 (1895).
28. *Id.* at 114-182.
29. *Id.* at 175.
30. 16 F.2d 197 (2d Cir. 1926).
31. *Id.* at 198.

> necessary facts. Indeed, if these be admitted, he may even in substance, if not in form, direct them outright to convict.[32]

However, in 1942 in the case of *United States v. Adams*,[33] Judge Hand sustained the contention of a criminal defendant who had acted as his own attorney that he would not consent to be tried by a judge except upon the advice of counsel. Judge Hand stated:

> The institution of trial by jury — especially in criminal cases — has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty — to say nothing of his life — only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree.[34]

In *Morris v. United States*,[35] the Court stated that

> [t]he jury must not be reduced to the position of a mere ministerial agent by a direction on their very thought, thereby withholding of a vital right due them. And the judge may not pass judgment on the ability of a jury to correctly act in any given situation and in his discretion limit their historic province.[36]

The Court then declared that

> [j]uries do, however, have decisions to make that are not wholly factual. "Lord Mansfield, the great prerogative lawyer of the last age, admits, that 'a Jury, by means of a general verdict are entrusted with a power of blending law and fact, and of following the prejudices of their affections or passions. It is the duty (says he) of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences.' — Argument in the Dean of St. Asaph's Case." [37]

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32. *Id.*
33. 126 F.2d 774 (2d Cir. 1942).
34. *Id.* at 775-6.
35. 156 F.2d 525 (9th Cir. 1946).
36. *Id.* at 529.
37. *Id.* at 530, quoting "Phillips on Juries, P. 172" [sic].

In 1957, it was stated in *United States v. Fielding* [38] that

> [a]n inherent feature of the common law trial by jury accorded by the Constitution of the United States to all defendants in criminal cases in Federal courts comprizes the power of the jury to find the defendant not guilty, even if the evidence of guilt is overwhelming or conclusive. A defendant may not be deprived of this right.[39]

Related to the problem of the power of the jury to decide the law is the power of the court to interfere with a verdict in which it appears that the jury exercised its power to decide the law. In *Dunn v. United States*,[40] in affirming petitioner's conviction of violations of the National Prohibition Act, the Court sustained a verdict that "may have been the result of compromise, or of a mistake on the part of the jury . . . ."[41] But it forcefully reminded us that "verdicts cannot be upset by speculation or inquiry into such matters."[42] In so doing, it cited with favor *Steckler v. United States*,[43] which the Second Circuit, in discussing an acquittal on one count of a single indictment and a conviction on another, the same evidence having been offered in support of each, stated:

> [t]he most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.[44]

In their dissenting statement at the time of the adoption of the 1963 Amendments to the Rules of Civil Procedure, Messrs. Justice Black and Douglas strongly recommended the repeal of Rule 49[45] rather than its amplification. In their words:

* * * *

> (d) If there are to be amendments, Rule 49 should be repealed. That rule authorizes judges to require juries to return "only a special verdict in the form of a special written finding upon each issue of fact" or to answer "written

38. 148 F. Supp. 46 (D.D.C. 1957).
39. *Id.* at 56.
40. 284 U.S. 390 (1932).
41. *Id.* at 394.
42. *Id.*
43. 7 F.2d 59 (2d Cir. 1925).
44. *Id.* at 60.
45. FED. R. CIV. P. 49, Special Verdicts and Interrogatories.

> interrogatories upon one or more issues of fact the decision of which is necessary to a verdict" in addition to rendering the general verdict. *Such devices are used to impair or wholly take away the power of a jury to render a general verdict.* One of the ancient, fundamental reasons for having general jury verdicts was to preserve the right of trial by jury as an indispensable part of a free government. Many of the most famous constitutional controversies in England revolved around litigants' insistence, particularly in seditious libel cases, that a jury had the right to render a general verdict without being compelled to return a number of subsidiary findings to support its general verdict. *Some English jurors had to go to jail because they insisted upon their right to render general verdicts over the repeated commands of tyrannical judges not to do so.* Rule 49 is but another means utilized by courts to weaken the constitutional power of juries and to vest judges with more power to decide cases *according to their own judgments.* A scrutiny of the special verdict and written interrogatory cases in appellate courts will show the confusion that necessarily results from the employment of these devices and the ease with which judges can use them to take away the right to trial by jury. We believe that Rule 49 be repealed, not amplified.[46]

The uneasiness of Justices Black and Douglas was reflected earlier by Mr. Justice Brandeis in his dissenting opinion in *Horning v. District of Columbia*:[47]

> It has long been the established practice of the federal courts that, even in criminal cases, the presiding judge may comment freely on the evidence and express his opinion whether facts alleged have been proved. Since *Sparf v. United States*, it is settled that, even in criminal cases, it is the duty of the jury to apply the law given them by the presiding judge to the facts which they find. But it is still the rule of the federal courts that the jury in criminal cases renders a general verdict on the law and the facts; and that the judge is without power to direct a verdict of guilty although no fact is in dispute. What the judge is forbidden to do directly, he may not do by indirection. The judge may enlighten the understanding of the jury and thereby influence their judgment; but he may not use undue influence. He may advise; he may persuade; but he may not command or coerce. He does coerce when without

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46. 9 L. Ed 2d lxvi (1962) (emphasis added).
47. 254 U.S. 135 (1920).

convincing the judgment he overcomes the will by the weight of his authority.[48]

Professor Paul A. Freund of the Harvard University Law School whom "many consider the nation's leading expert on constitutional law,"[49] has recently stated that in conscience cases, "a jury should be allowed to acquit people who act in a measured way for reasons of conscience."[50] He went on to add that:

> there ought to be some new doctrine which would permit a judge to tell a jury that they were to decide in the light of all the circumstances. After the law has been explained to them, the judge might add that the defendants can be acquitted and that the jury does not have to give reasons.[51]

Juries, according to Professor Freund, would have to give

> "respectful attention" to the law, but it would be made clear to them that nothing would bar them from choosing for the defendant despite respect for the law.[52]

Professor Joseph L. Sax shares Professor Freund's views on jury nullification.[53] Sax points out that

> [t]he issue is whether there is a need to expand the criminal defendant's opportunity to make a broader appeal to the community's sense of justice in those cases where at present both juries and the larger public which they represent feel obliged to follow the judge's instruction and conviction.[54]

Putting the question in a larger context, he adds:

> Moreover, it is important to recognize that the comments made here are not directed simply to the question of jury behavior in individual cases. What is really at stake is the general public attitude toward vigorous dissent of a kind which goes beyond the limits of judicially acceptable protests. The readiness of the general public to accept the notion that such protesters have a right to argue, and to

48. *Id.* at 139 (citations omitted). Significantly, the majority in *Morning* recognized that
> . . ."that the jury has the power to bring in a verdict in the teeth of both law and facts."

Id. at 138.
49. N.Y. Times, Sept. 19, 1968, at 4, col. 1.
50. *Id.*
51. *Id.*
52. *Id.*
53. *See* Sax, *supra* note 18.
54. *Id.* at 490.

> have accepted, the justness of their conduct, is a critical indicator of society's view about the relation between the government and the people; it measures the ability to perceive a difference between the citizen's obligation to the demands of the individuals who hold public office at a particular time, and to the principles upon which his nation was founded. Those two concepts may not often be at odds; but a willingness to recognize that they may be, and that vigorous forms of protest may be appropriate to bring them back into alignment, is an important measure of the underlying political philosophy of a society.[54]

The most potent criticism of jury nullification, according to Sax, relates to its possible abuse. Why, for example, could it not be used to acquit persons guilty of crimes against civil rights advocates in areas where popular passions are misdirected? Sax first points out that such acquittals have occurred under the present system and there is no legal means of preventing them. The question then is whether a change in the permissible instructions to the jury is likely to lead to a significant increase in the number of unjust acquittals.

Sax's answer is primarily historical — jury nullification has not wrought injustice in the past:

> There is no evidence of any such result when the right of jury nullification was recognized either in England or the United States. It was widely observed that the enactment of Fox's Libel Act in 1792, which was the culminating victory of those who wanted to enlarge the jury's function, did not impede the government in obtaining criminal convictions. And fifteen years after the passage of the Act, it was reported in the parliamentary debates that "notwithstanding it had been declared by magistrates of the greatest learning that the establishment of such a system would produce minimal (!) confusion and disorder . . . the functions of judges and juries have been executed within their respective limits . . . to the advancement of justice and to the dignity of its administration."[55]

He also attempts to quiet fears that have arisen from the possible application of jury nullification to civil rights crimes. Noting that the fear of unjust acquittals is directed almost exclusively to conduct which is violent and seriously antisocial by its very nature he contrasts the violent case with that of free speech:

> Thus, the self-interest of the community in convicting those who engage in violent acts is inevitably strong, and the

54. *Id.* at 491.
55. *Id.* at 492.

> risks of unjust acquittals in such situations [free speech] is both lesser and of less concern to the maintenance of the social order than is the risk to be apprehended from authorizing the just acquittal.[57]

To support jury nullification is not to maintain that men are free to pick and choose with impunity what laws they will or will not obey. This is not and has never been the historical standard. However, when such choices are made, it is not too much to demand that juries must be let in on the closely guarded secret that they are, in the final analysis, the consciences of their communities and, as such, are free to acquit those, like John Peter Zenger, who, under ordinary circumstances, are indeed guilty of breaking the law in question. This is a far cry from insisting that all men who follow the dictates of their consciences must go free on that account, alone.

Unless the jury can exercise its community conscience role, our judicial system will have become so inflexible that the effect may well be a progressive radicalization of protest into channels that will threaten the very continuance of the system itself. To put it another way, the jury is, both by original design and by the nature of its own inherent structure, the safety valve that must exist if this society is to be able to accommodate itself to its own internal stresses and strains. If the jury can negate both law and fact, then it can express the deep desires of the community it represents as to whether it feels that, under certain circumstances, some laws should indeed be broken with impunity. In this manner, this ancient institution can significantly affect or even alter the bedrock decisions that can, in so many instances, determine whether men shall survive or perish, eat or go hungry, or live in liberty or as slaves.

There can be no question that it is now a fundamental tenet of our federal jurisprudence that juries must be a representative cross-section of the community.[58] In fact, Congress has just enacted legislation to make certain that, in the courts of the United States, juries meet this standard of representation.[59] Implicit in this national determination is the inescapable conclusion that criminal defendants should have the benefit of the local consensus as to their guilt or innocence under the laws asserted against them. If the community is to sit in the jury box, its decisions cannot be legally limited to a conscience-less application of fact to law.

The rule of law cannot mean that there shall be an unbroken, inflexible pattern of squaring fact with law to reach, in every instance, a mechanistic, almost computer-like conclusion. If jurors were so compelled, then John Peter Zenger would have rotted in a colonial jail along with the right of newspapers to print the truth without fear that

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57. *Id.* at 493.
58. *See* Witherspoon v. Illinois, 391 U.S. 510 (1967).
59. Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869. (Supp. IV 1969).

their publishers, editors, or reporters would pay for their veracity with years of their lives. But as Andrew Hamilton told the printer's jury, the answer was for it to fulfill its solemn duty "to support liberty, the only bulwark against lawless power which in all ages has sacrificed to its wild lust and boundless ambition the blood of the best men that ever lived."[60]

It is true that many judges, particularly those on the federal bench, have been inordinately impressed by Mr. Fortas' recent work on civil disobedience.[61] Some have even progressed to the point where they are fashioning some of their charges to the jury from it.[62] In essence, Mr. Fortas maintains that any violation of the law, no matter how well-intentioned or sincerely motivated, must be punished. As he puts it, "Protesters and change-seekers must adopt methods within the limits of the law."[63] But he fails to take into consideration the fact that juries can nullify those laws that affront their consciences. This is precisely why, a century past, Northern juries steadfastly refused to convict those men and women who, in open defiance of federal law, refused to surrender fugitive slaves to their pursuers.[64]

The issue is once more squarely posed for the first time since Spurz. Perhaps Andrew Hamilton put it best on that hot summer's day in August, 1735, when he ended his long summation to the Zenger jury with these words, as applicable now as they were then:

> . . . [T]he question before the Court and you gentlemen of the jury, is not of small or private concern, it is not the cause of a poor printer, nor of New York alone, which you are now trying: No! It may in its consequence affect every free man that lives under a British government on the main of America. It is the best cause, it is the cause of liberty; and I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens; but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny; and by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbors that to which nature and the laws of our country have given us a right — the liberty — both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth.[65]

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60. J. ALEXANDER, *supra* note 8, at 98.
61. A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968).
62. See, *e.g.*, United States v. Berrigan, *supra* note 2.
63. A. FORTAS, *supra* note 61, at 106.
64. See, *supra* note 18, at 482-3.
65. J. ALEXANDER, *supra* note 8, at 99.